

CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

DR. DANNY RAY WESTMORELAND,
Plaintiff,

v.

CIVIL ACTION NO. 05-C-97
JUDGE: TOD KAUFMAN

SHRIKANT K. VAIDYA, MD,
Defendant.

ORDER

Facts

On June 16, 2003, Dr. Vaidya removed a stent from Plaintiff. This procedure required the use of a medical device to enter the ureter, visualize the stent, and remove it. Plaintiff filed a medical professional liability action against Dr. Vaidya on June 10, 2005, claiming Dr. Vaidya internally injured him during the procedure and that Dr. Vaidya continued the operation after Plaintiff asked Dr. Vaidya to stop.

On October 26, 2006, this court dismissed Plaintiff's claim for failure to comply with the Certificate of Merit requirement under West Virginia's Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-6. *See* Order of October 26, 2006. Plaintiff admitted his awareness of the Certificate of Merit requirement and it is undisputed that Plaintiff did not serve Dr. Vaidya with a Certificate of Merit. Plaintiff did attempt to obtain a Certificate of Merit and Plaintiff contends that two specialists in urology were willing to sign a Certificate of Merit on his behalf in this case.

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CLERK OF COURT
MASON COUNTY CIRCUIT COURT

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MASON COUNTY

**PLAINTIFF HAS FAILED TO STATE GROUNDS
SUFFICIENT FOR RELIEF UNDER 60(B).**

To sustain a motion for reconsideration, Plaintiff must satisfy the stringent requirements of Rule 60(b) of the West Virginia Rules of Civil Procedure, which provides, in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Plaintiff claims he is entitled to reconsideration on two grounds. First, because he made procedural errors constituting mistake and excusable neglect and second, under the "any other reason justifying relief from the operation of the judgment" provision of Rule 60(b). Plaintiff's contentions under both grounds are insufficient to merit reconsideration.

Plaintiff has failed to show excusable neglect and mistake warranting reconsideration. The Supreme Court of Appeals describes excusable neglect and mistake as "requiring a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within

the [] rules.” *Delapp v. Delapp*, 584 S.E.2d 899, 904-905 (W.Va. 2003) (citations omitted). Applying *Delapp*, this court should not grant Plaintiff’s 60(b) motion on excusable neglect and mistake because Plaintiff failed to show good faith and a reasonable basis for noncompliance. Plaintiff knew of the Certificate of Merit requirement when he filed his claim and he was reminded of his noncompliance when Dr. Vaidya filed his Motion to Dismiss of June 30, 2005. This means that for the past 18 months Plaintiff has neglected to address these deficiencies.

Plaintiff has also failed to show “any other reason” warranting reconsideration for his failure to comply with the MPLA. Out of respect for judicial finality, courts only grant reconsideration as a remedy in the most exceptional circumstances. The Supreme Court of Appeals has held that “[r]arely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary’s adherence to the finality doctrine, relief under this provision is not to be liberally granted.” *Coffman v. West Virginia Div. of Motor Vehicles*, 551 S.E.2d 658, 662 (W.Va. 2001) (citations omitted).

The Supreme Court of Appeals has held that “rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit.” Syl. pt. 2, *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 475 S.E.2d 55 (1996).

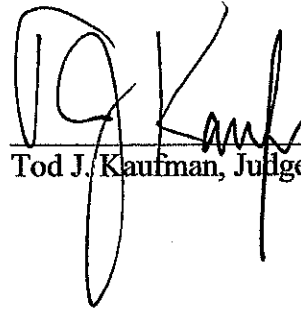
Conclusion

For the foregoing reasons, the court denies Plaintiff's Motion for Reconsideration and for Relief. The Circuit Clerk shall send a certified copy of this Order to:

Rob J. Aliff, Esquire
Jackson Kelly PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, WV 25322

Robert W. Bright, Esquire
Story Law Office
P. O. Box 72
Pomeroy, OH 45769

ENTER this 8th day of December 2006.


BY _____
Tod J. Kaufman, Judge

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2007 FEB 15 AM 10:47
MASON COUNTY CIRCUIT COURT

Case dismissed. Ogk. judge

TRUE COPY TESTE *Bill Withers plr*
MASON COUNTY CIRCUIT CLERK